Before the Federal Communications Commission

SBC-Ameritech Public Forum

CC Docket No. 98-141

May 6-7, 1999

Comments of Neil F. Hartigan

Partner, McDermott, Will & Emery

My name is Neil Hartigan and I am here today to give testimony in support of the proposed merger of SBC and Ameritech and to address several issues that have been raised in the course of this docket. In particular, I would like to testify to the real benefits that will result from the merger of these two companies. In addition, my comments relate to the merits of some of the regulatory concerns and remedies that may be under consideration. My qualifications in this regard stem from my governmental/regulatory background and my first hand experiences with these companies as a government official, as a private practitioner and as an Illinois consumer.

I am a partner in the Corporate Department of McDermott, Will & Emery, which is an international law firm based in Chicago. I am also the Chairman of the World Trade Center Chicago, which serves to develop and coordinate economic and trade relationships between the Chicago and international business communities. In addition, I am a member of the Board of Directors of the Federal Home Loan Mortgage Corporation (Freddie Mac). Prior to entering the private sector, I was a public servant for over 25 years. My career in public service began in the City of Chicago where I was Deputy Mayor and held various other offices. From the City of Chicago, I moved into

Illinois State government where I was elected to the post of Lieutenant Governor and the Office of Attorney General for two terms.

As Attorney General, I was the chief law enforcement officer for the state and I took a leading role on a state and national level in the enforcement of consumer protection and antitrust laws. Of course, I also represented consumers and the Illinois Commerce Commission (ICC) in connection with telecommunications and other utility related matters. On the national level, I was Chairman of the National Association of Attorneys General (NAAG) Consumer Protection Committee as well the NAAG/Federal Trade Commission Working Group during a time period when NAAG and the states were extremely active in telecommunications issues. This was the case, in part, as a result of the fact that Judge Green had just approved the Modified Final Judgment.

The experience that I gained in public life has carried through to my private practice. I have several telecommunications industry clients, including Ameritech and SBC, for whom I provide regulatory counsel and advice. I am familiar the business practices of SBC and Ameritech, particularly as they relate to the implementation of the Telecommunications Act of 1996. Further, as a former Attorney General I have had contact with various state Attorneys General on some of the specific issues that are before the Commission at this time.

Based on this background, my testimony will address three basic issues that have emerged in this merger docket. First, I would like to draw the Commission's attention to the very tangible and significant consumer benefits that will flow from the proposed merger. Second, I will comment on the benchmark issue that has been raised as a theoretical problem that could hypothetically hamper regulatory effectiveness at some

point in the uncertain future. In a related vein, I will discuss my complete confidence that federal, state and local regulators will be more than capable of overseeing the merged company. Finally, I will conclude by urging the Commission to approve the merger and reject the proposal that its approval be conditioned upon the companies obtaining approval of Section 271 applications in any or all of the affected states.

I. THE MERGER OF SBC AND AMERITECH WILL RESULT IN SIGNIFICANT CONSUMER BENEFITS.

Some have argued that, in the absence of a merger, SBC and Ameritech would compete aggressively in each other's territories. To support this position, certain regulators point to Ameritech's plan to compete in St. Louis and the framework that SBC had put in place to compete in Chicago. As the Commission has been advised by the companies, these forays into each other's markets were nascent and, in some respects, less than successful. Regardless of whether these fledgling projects would have resulted in some competition in two isolated markets, it is essential that the Commission focus on the bigger picture presented by this merger. By the "bigger picture," I mean the National-Local Strategy, which is the cornerstone business plan of the merger. Rather than focusing on the uncertain establishment of competition in two markets, I urge you to consider and recognize the benefits of competition in the 30 National-Local Strategy marketplaces.

Further, we cannot discount the fact that the implementation of the National-Local Strategy will stimulate more competition. The local exchange carriers will have to compete in their existing markets as well as in the merged company's

territory. To do otherwise would be to risk losing their current market shares and the opportunity to build new markets. It is naïve to believe that natural competitors will not respond to the National-Local Strategy. It is a forgone conclusion that, as the merged company begins to compete on a national level, market pressures will force all dominant players to aggressively compete throughout the SBC/Ameritech regions. This is not mere conjecture; other local exchange carriers such as Bell Atlantic and GTE have already announced new out-of-region plans to rival the National-Local Strategy. The company's entry into out-of-region local markets under this strategy, will not only stimulate competition among the local exchange carriers, it will also trigger competition from the long distance carriers as well.

Of course, increased competition leads to innovations in products, services and sales practices. The merger will assure the company a strong foundation from which to create new technologies and provide new products and services to a broader array of consumers within its region as well as those included within the National-Local Strategy. It will also be possible for the new company to identify the most effective, best practices of the merged entities for developing and delivering more and better products and services to end-users. Finally, it is obvious that the company, by virtue of its size and available resources, will have an enhanced ability and incentive to exploit the economies of scale for the purpose of lowering costs and attracting customers.

II. THE REGULATORY COMMUNITY AND THE INDUSTRY WILL NOT LOSE A VALUABLE BENCHMARK BUT, IN FACT, WILL BE ABLE TO POLICE THE INDUSTRY MORE EFFECTIVELY.

A. It Will Be Possible to Use Benchmarks to Monitor the Merged Company and Other Industry Participants.

Some critics of the merger argue that a reduction by one in the number of Regional Bell Operating Companies (RBOC) will restrict regulators' ability to benchmark best, pro-competitive practices. This criticism is unfounded for at least two extremely important reasons. First, it is based on conjecture which does not even tangentially relate to the appropriate statutory standards for Commission review of a transaction of this type. Second, even if the benchmark issue were a concrete and appropriate element of the Commission review process, there is no basis to believe that the proposed merger will impede the ability of regulators or members of the industry to benchmark best practices. In fact, from my experience as a regulator, a very strong argument can be made that the merger will enhance benchmarking.

The telecommunications market is rife with competitors who are clamoring to expand and grow their markets and there are many players who can and will set benchmarks. Benchmarks for best business practices will continue to be established not only by RBOCs but also the growing number of long distance carriers and other new entrants in the industry such as the electric utilities and cable operators. In fact, there are literally hundreds of significant business participants in the telecommunications industry who are constantly on the process of establishing benchmarks.

The reality is that the merger of SBC and Ameritech will actually increase the number of marketplace benchmarks. I have been advised that several Competing

Local Exchange Carriers (CLEC) have already begun to compare collocation, interconnection and unbundling practices between SBC and Ameritech. For example, Ameritech has recently received letters from CLECs indicating that they expect Ameritech to adopt PacBell's collocation practices after the merger. These CLECs have also asked that Ameritech implement those practices in advance of the merger. In short, the reality is that CLECs, far from being harmed, will actually be helped by the merger.

Further, with the growth of the global telecommunications marketplace, we are no longer tied to the traditional boundaries of this country for the establishment of benchmarks. Regulators will have the benefit of international players entering our marketplace, with new concepts, ideas and "regulatory themes," which the states and the federal government will be able to utilize when policing the industry.

B. The Merged Companies Will Be Subject to Adequate and Full Regulatory Authority.

An argument has also been made that the merger proposed between SBC and Ameritech could theoretically diminish or dissipate the ability of regulators to analyze the competitive behavior of these two companies. As even the proponents of this argument admit, there is no such standard for review under the traditional standards for antitrust merger analysis. In reality, the concept is a red herring. It is not founded in objective fact; rather it is based entirely on speculation.

The concept is founded in an assumption that the merged company will be able to internalize anticompetitive activity and thus render itself invisible to the regulatory eye. This argument, of course, relies on a presumption that the company will engage in behavior designed to stifle competition. It also assumes that state and federal

regulators, despite all of their expertise, investigative powers and statutory authority, will somehow be rendered ineffective. As a former Attorney General and regulator, this concern, more than any other, strikes me as the most surprising. Over the years, I have been quite impressed with the increased level of regulatory sophistication, particularly in the areas of telecommunications and antitrust enforcement.

Not only am I confident in the expertise and capability of state and federal regulators, I do not believe that the merger of Ameritech and SBC will in any way dilute their effectiveness. If anything, the merged company will attract increased scrutiny, not only from regulators, but also from competitors, watchdog organizations and public interest groups.

The merger of SBC and Ameritech will effectively create one of the most regulated companies in the United States. This is true because each state in which the two companies now do business will oversee this new entity. That means that 13 separate state commissions will have home state regulatory authority over the new entity. Furthermore, the entity's National Local Strategy will be exposed and subjected to regulation in the states where the new markets are located.

As we all know, the states are very aggressive regulators particularly where the telecommunications industry is concerned. In fact, NAAG has several telecommunications related committees, task forces and working groups that were in place before passage of the 1996 Act. Organizations like NAAG and the National Association of Regulatory Utility Commissions (NARUC) provide the states with very efficient mechanisms for sharing information and conducting joint enforcement

initiatives. It is also very significant that this Commission will always be in a position to regulate the merged company's competitive practices and activities extremely effectively.

Moreover, it would be a mistake to underestimate the scrutiny that the merged company will attract from its existing and new competitors. Surely, no one can believe that AT&T, MCI World Com, Sprint or other competitors will sit idly by and ignore the anticompetitive behavior of any market player.

Finally, public interest groups will continue to monitor the company's conduct. Rest assured, should the merged company engage in any anti-competitive or unfair and deceptive conduct, an uproar would be heard. In short, it is highly unlikely that the merger could or would dissipate the effectiveness of regulatory oversight.

III. THE COMMISSION SHOULD NOT IMPOSE A §271 CONDITION ON THE APPROVAL OF THIS MERGER.

As pointed out so eloquently in Congressman John Dingell's letter of April 15, 1999 to Commissioner Kennard, it would be inappropriate and inconsistent with its legal mandate under the Communications Act of 1934 for the Commission to condition its approval of this merger upon the companies' successful pursuit of Section 271 applications.

SBC and Ameritech are obligated by Section 251 of the Telecommunications Act to open their markets. If the Commission believes that either company is not complying with that obligation, its remedy is to exercise the enforcement authority granted to it by the Act. Section 271 provides RBOCs with a totally voluntary avenue for applying to enter into the long distance market. It would be unprecedented to force these companies to file a Section 271 application and obtain Commission approval

under the checklist. This is especially true in light of the fact that no agency has yet defined or set the parameters for checklist compliance for the purpose of obtaining approval of a Section 271 application.

As I mentioned above, RBOCs must comply with Section 251 requirements that they open their local markets to competition. There have been no enforcement or regulatory challenges against SBC or Ameritech that suggest that they have failed to do so. While it is true that local competition in residential markets lags behind that of commercial markets, it does not follow that this is the result of RBOCs' failure to open their markets. Rather, it is more likely that this disparity results from the long distance carriers' reluctance to implement existing interconnection contracts and serve the local residential customer bases that are not nearly so profitable as the commercial local markets. Not only do long distance carriers maximize their profits by cherry picking the lucrative commercial customers, they inhibit the ability of RBOCs to obtain approval of Section 271 applications by declining to market their local services to residential customers.

The proposed Section 271 condition is inappropriate and inconsistent with the Commission's oversight authority under the law. The Commission's review of this transaction must be focused on the effects of the transaction itself, as opposed to purely hypothetical and future business practices of the merged entity. The suggestion that Section 271 approval be a prerequisite to the transaction is an attempt to engraft the Commission process with considerations that go far beyond the effects of the transaction itself. There is no precedent for such a prerequisite. The Commission's approval of the mergers between MCI and WorldCom as well as AT&T and TCI were based on whether

the proposed transfer would serve or disserve the "public convenience and necessity." To review the SBC and Ameritech merger based on a broader standard, and impose inappropriate and uncontrollable conditions on the merger, would smack of prefatory treatment for one segment of the industry as opposed to another. In fact, the proposed Section 271 condition would place a powerful tool in the hands of competitors to block and impede the merger. All they would have to do is continue to drag their feet in implementing the interconnection contracts that they have with SBC or Ameritech.

CONCLUSION

In concluding my remarks I would just like to make some observations regarding my experience with SBC and Ameritech and, in particular, the incredible efforts that they have made to open their markets in furtherance of the goals of the Telecommunications Act of 1996. As many of you know, Ameritech was the first company to attempt to open its markets to competitors even before passage of the Act. Both companies lead the field in negotiating interconnection agreements and complying with Section 251 of the Act. Despite all of their achievements and good faith efforts, I have deep concerns when regulators insist on creating barriers that impede the companies' ability to fully and fairly compete. I find it astounding that, since the Telecommunications Act was adopted in February of 1996, we have witnessed exponential growth in Internet commerce and the European Union has developed from ground zero to a viable economic community with its own currency. Yet, companies like SBC and Ameritech are struggling with unnecessary regulatory impediments to competition, contrary to the letter and spirit of the Act.

I believe that regulatory oversight of the implementation of the Act has been too focused on protecting competitors as opposed to making it possible for companies to bring new and affordable products and services to consumers. Ultimately, I am not here today merely as a representative of these two companies but as a frustrated consumer who would like the goals enumerated in the Act to be a reality. I am sure that I speak for many other citizens of Illinois and the country when I urge the Commission to approve this merger and clear the way for progress.